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No. 90-1598

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LAWRENCE J. KORB,
Petitioner,
v.
JOHN F. LEHMAN, JR., MELVYN R. PAISLEY,
EVERETT PYATT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT JOHN F. LEHMAN, JR.

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QUESTION PRESENTED

Whether, in early 1986, reasonable officials in respondents' positions would have known that it violated petitioner's clearly established First Amendment rights to contact his private employer and comment adversely on petitioner's public statements concerning matters directly related to the officials' duties and the employer's business, when those contacts allegedly resulted in the petitioner's dismissal.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
SUMMARY	1
COUNTERSTATEMENT OF THE CASE	2
A. Factual Background	2
B. Procedural History	7
REASONS WHY THE WRIT SHOULD BE DENIED	10
A. The Law Of Qualified Immunity Is Well Settled	10
B. There Is No Dispute Or Confusion About How To Apply These Standards	11
C. The Fourth Circuit Decision Is Correct	12
D. The Court Should Resist Petitioner's Inappropriate Request For An Advisory Opinion	16
CONCLUSION	17

TABLE OF AUTHORITIES

CASES Page

Alexander v. Perrill, 916 F.2d 1392 (9th Cir. 1990) 12
Anderson v. Creighton, 483 U.S. 635 (1987) 2, 8, 9, 11, 12, 13
Benson v. Allphin, 786 F.2d 268 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986) 13, 14, 15, 17
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 7
Bush v. Lucas, 462 U.S. 367 (1983) 16
Cleveland-Perdue v. Brutsche, 881 F.2d 427 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 368 (1990) 11, 12
Donohoe v. Watt, 546 F. Supp. 753 (D.D.C. 1982), *aff'd mem.*, 713 F.2d 864 (D.C. Cir. 1983) 9, 13, 14
Dube v. State Univ. of New York, 900 F.2d 587 (2d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3278 (Sept. 27, 1990) 11, 12
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 8, 9, 11
Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989), *rev'd on reh'g on other grounds*, 928 F.2d 920 (10th Cir. 1991) (en banc) 12, 13
Mitchell v. Forsyth, 472 U.S. 511 (1985) 16
Nixon v. Fitzgerald, 457 U.S. 731 (1982) 16
Pickering v. Board of Educ., 391 U.S. 563 (1968) .. 13
Reuber v. Food Chemical News, Inc., 899 F.2d 271 (4th Cir. 1990), *vacated on reh'g on other grounds*, 925 F.2d 703 (4th Cir. 1991) (en banc) 15
Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984) 14, 15, 16
Robinson v. Bibb, 840 F.2d 349 (6th Cir. 1988) 12
Schweiker v. Chilicky, 487 U.S. 412 (1988) 16
Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) 17
Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499 (11th Cir. 1990) 12
Thompson v. City of Starkville, 901 F.2d 456 (5th Cir. 1990) 12
United States v. $5,644,540.00 in United States Currency, 799 F.2d 1357 (9th Cir. 1986) 8
Warth v. Seldin, 422 U.S. 490 (1975) 17

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS Page

U.S. Const. art. III 17
U.S. Const. amend. I ..... *passim*
U.S. Const. amend. IV 13, 16

STATUTORY PROVISIONS

5 U.S.C. § 522(b) 14
10 U.S.C. § 2324(e)(1)(B) 4

RULES

Fed. R. Civ. P. 12(b)(6), (c) 2
Fed. R. Civ. P. 56(c), (f) 2, 8

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BRIEF IN OPPOSITION OF RESPONDENT JOHN F. LEHMAN, JR.

SUMMARY

Respondent John F. Lehman, Jr. respectfully requests the Court to deny Lawrence J. Korb's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. The opinion below involved a straightforward case of qualified immunity, in which the narrow issue presented was whether respondents reasonably could have known that their specific conduct violated any right of the petitioner's that was clearly established in 1986. The Fourth Circuit correctly applied the well-settled law of qualified immunity to the particular facts of this case, and found that there was case law in existence in 1986 from which respondents reasonably could have concluded their conduct was in fact lawful and appropriate. The court did not render a decision in conflict

with any other court, nor did it depart from the rulings of this Court with regard to qualified immunity. Therefore, petitioner's claim does not merit further review.

COUNTERSTATEMENT OF THE CASE

A. Factual Background.[1]

In September 1985, after four years as the Assistant Secretary of Defense (Manpower, Installations, and Logistics), petitioner Lawrence J. Korb went to work for Raytheon Corporation. As vice president in charge of Raytheon's Washington, D.C. area office, Korb was responsible for Raytheon's relations with Congress and the Department of Defense.

On February 25, 1986, Korb participated in a news conference held by an organization called the Committee

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[1] In his Statement of the Case, petitioner asserts that this Court must accept the allegations in petitioner's complaint as true. *See* Petition for Writ of Certiorari 5 n.1 ("Petition"). Respondents have contended throughout this litigation that they are entitled to dismissal even if the petitioner's allegations are taken as true; the courts below, however, clearly were not required to do so, especially when, as will be noted below, the record affirmatively contradicts several key allegations. Respondents filed a Motion to Dismiss, or in the Alternative, for Summary Judgment, supported by declarations and affidavits, and Korb countered with an affidavit of his own. It was therefore appropriate for the courts below to rely on matters outside the pleadings. *See* Fed. R. Civ. P. 12(b)(6), 12(c), and 56(c). This was especially so in light of this Court's guidance that the issue of qualified immunity "should be resolved at the earliest possible stage." *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). The district court granted both of respondents' motions in the alternative, Appendix to Petition for Writ of Certiorari 54a ("App."), and the Fourth Circuit implicitly affirmed both the dismissal and the grant of summary judgment on the basis of qualified immunity, as is evidenced by its reliance on matters outside the pleadings and its citation to Fed. R. Civ. P. 56(c). *See* App. 13a. Respondent therefore bases his counterstatement of the facts on the decisions of the courts below, which, viewing the declarations and affidavits in the light most favorable to petitioner, found the undisputed facts stated herein. *See* App. 2a-11a; *id.* at 31a-41a.

for National Security ("CNS") to announce the publication of CNS's "alternative defense budget." An article appeared in the next morning's *Washington Post*, describing CNS as advocating a $200 billion reduction in President Reagan's five-year defense budget and quoting Korb as criticizing the administration's plan to build a 600-ship Navy. The article, headlined "Pentagon Ex-Defender Turns Critic," identified Korb as "a private citizen working for arms maker Raytheon Co.," speaking "as a member of the Committee for National Security."

Upon learning of Korb's remarks from news accounts, and prior to receiving any comments from the Navy or others outside Raytheon, several Raytheon executives became upset. They felt that Korb's statements were not appropriate for a Raytheon executive and that Raytheon inevitably would be associated with Korb's views.

Following the press accounts of the news conference, Korb's statements also were a subject of discussion at a regular morning staff meeting held by Secretary of the Navy John F. Lehman on February 26, 1986. At that meeting, Lehman expressed displeasure that one of the Navy's contractors was advancing programs that Lehman believed seriously would impair national defense. Lehman made no representation that he would seek retribution against Korb or Raytheon. He did not address his comments to anyone in particular, nor did he request or encourage anyone present to call Raytheon.

Later that day, two staff members who attended Secretary Lehman's meeting, Melvyn R. Paisley, Assistant Secretary of the Navy (Research, Engineering, and Systems), and Everett Pyatt, Assistant Secretary of the Navy (Shipbuilding and Logistics), independently and on their own initiative called Raytheon executives to express their displeasure with Korb's statements. Paisley felt that Korb's position was inconsistent with that taken by Raytheon in earlier meetings. As a result, Paisley doubted Raytheon's credibility and felt that he had been

deceived. He called a senior vice president of Raytheon, R. Gene Shelley, with whom Paisley frequently had worked in the past and whom he often called. Paisley told Shelley that the statements attributed to Korb in the *Washington Post* article troubled him, and he expressed his view that a Raytheon official ought to be careful about talking in a public forum because of the possibility of inaccurate reporting. Paisley did not ask Shelley to silence or to take any action against Korb. Nor did Shelley view the call as an invitation to take any action against Korb or have the sense that Paisley implicitly expected some action to be taken. Shelley considered the phone call "a minor flap," not relevant to whether Raytheon won or lost defense contracts. App. 35a.

That same day, Pyatt called Dennis Picard, another Raytheon senior vice president. Pyatt told Picard that he disagreed with and was unhappy about the positions attributed to Raytheon's employee Korb—in particular, the claims that $200 billion could be cut from planned defense spending during the next five years and that the Navy's commitment to build and staff 600 ships could be abandoned without adversely affecting the security of the United States. Pyatt also noted that the Navy may not absorb a contractor's lobbying expenses as reimbursable costs (pursuant to 10 U.S.C. § 2324(e)(1)(B) (Supp. 1988)) and that through the payment of general overhead accounts, the Navy was, in effect, contributing a portion of the salary that Raytheon paid Korb. Pyatt did not demand, request, or suggest that Raytheon take any personnel action regarding Korb. Nor did Pyatt attempt to intimidate, coerce, or threaten Picard or Raytheon in any way. Picard did not consider Pyatt's call to be inappropriate in any respect.[2]

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[2] None of the affidavits or declarations submitted by the parties to these calls provides any support for the allegations in Korb's complaint, repeated in his petition, that Paisley or Pyatt threatened Raytheon in any way, made any demands of Raytheon, or

Secretary Lehman did not ask Paisley or Pyatt to make these contacts and did not know these calls were made until after the fact. When he later learned of the telephone calls, Lehman expressed his opinion that Paisley and Pyatt had acted appropriately.[3]

Following Paisley and Pyatt's telephone calls, Raytheon's Picard and Shelley contacted Korb's principal supervisor Philip Phalon to express their own dissatisfaction with Korb's news conference and to report the Navy's reaction to Korb's public statements. They accurately reported the contents of the Navy officials' calls; in particular, they did not tell or imply to Phalon that the Navy had asked Raytheon to silence or terminate Korb, or that the Navy had in any way threatened, coerced, or intimidated Raytheon. Phalon himself did not receive any calls directly from Navy officials immediately following the news coverage of Korb's press conference.

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warned that "Raytheon's future business dealings with the Pentagon could be harmed by Korb's presence." Petition at 7-8; App. 61a. Moreover, Pyatt's affidavit and Picard's declaration establish that there is no support for the allegation in petitioner's complaint, based on "information and belief," that Pyatt told Picard that he would "stop assisting Raytheon with certain defense contracts." Petition at 8; App. 61a. It is significant in this regard that the declarations of all the Raytheon executives involved in this matter were based on and incorporated the transcript of sworn interviews that they had previously given to an independent third party.

[3] Prior to the calls that Pyatt and Paisley made, Lehman did no more than express, at a staff meeting, his personal views on Korb's publicly reported statements. There is no basis in the record for petitioner's allegation, which he repeats here, that Lehman before the fact approved of the telephone calls made by his co-respondents. *See* Petition at 7; App. 59a-60a. As petitioner conceded in pleadings below, Lehman did not express any approval for these telephone contacts before they were made. Lehman personally had no contact with any Raytheon official until after Korb's superiors already had made the decision to remove him from his position.

Phalon was the individual principally responsible for hiring Korb, and during the six months Korb had worked at Raytheon, Phalon and other Raytheon executives had become displeased with Korb's job performance. In fact, Picard had concluded that Korb was not the right person for the job. Phalon was concerned about Korb's regular absences from Raytheon's Washington office due to his extensive speaking schedule, and felt that the frequent press coverage of Korb was inconsistent with Korb's duties at Raytheon. In particular, Phalon was angered when Korb, prior to the February 26 news conference, had permitted a television network news interview, in which he was critical of the yet-to-be announced defense budget, to be taped in Raytheon's offices.

Sometime between February 26 and mid-March 1986, Phalon, after consulting with others at Raytheon, made an initial decision to terminate Korb. While Phalon took into consideration the Navy's calls to Raytheon complaining of Korb's press statements, the calls did not trigger his decision to remove Korb as head of the company's Washington office. Rather, "Korb's departure from [Raytheon] was part of a continuum," according to Phalon, and the calls from the Navy were not "a decisive moment in time" for Korb's relationship with Raytheon. App. 9a.

In mid-March, after Raytheon's initial decision had been made, Secretary Lehman called D. Brainerd Holmes, then president of Raytheon. Lehman had heard reports that Korb was going to be terminated and called to urge Raytheon to reconsider this decision. This was Lehman's first contact with anyone at Raytheon concerning Korb. He assured Holmes that the Navy could work with Korb. Lehman did not suggest or ask that Raytheon take any action against Korb, nor did he make any express or implied threats or statements that could be considered intimidating or coercive. Holmes said the company would take Lehman's views into consideration, but would make

a decision about Korb independent of his relations with the Navy.

On March 7, Assistant Secretary Pyatt met with Phalon. Phalon was assessing whether Raytheon should remove Korb from his position as Washington vice president and sought Pyatt's views. Pyatt responded that the matter was solely for Raytheon to decide, but he stressed that the Navy was fully prepared to work with Korb in the future, if Raytheon should decide against making a change. Pyatt reiterated these views in a letter to Phalon dated March 19, 1986. Assistant Secretary Paisley also wrote a letter at this time to his contact at Raytheon, urging that Korb be retained in some capacity by the company.

Eventually, in an exercise of independent judgment, the responsible officials at Raytheon offered Korb another position, which he declined to accept. Shortly thereafter, at the request of Congress, the Department of Defense Inspector General's Office investigated the facts surrounding Korb's leaving Raytheon. At the conclusion of the investigation, it reported that there was no evidence to suggest that Navy officials either requested or intended that Korb be fired. Further, according to the report, Korb's departure from Raytheon was not solely attributable to the complaints by Paisley and Pyatt, but rather to a combination of factors. The report also concluded that none of the Navy officials violated any existing statute or regulation.

B. Procedural History.

On February 25, 1988, petitioner Korb filed a complaint against respondents Lehman, Pyatt, and Paisley, asserting a *Bivens* claim [4] for violation of Korb's First

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[4] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Amendment rights.[5] The respondents answered the complaint and asserted the affirmative defense of qualified immunity. The United States Magistrate stayed discovery pending respondents' prompt filing of a Joint Motion to Dismiss, or in the Alternative, for Summary Judgment on the grounds of qualified immunity and other issues, in accord with *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed.").

Although discovery had been stayed, the court had before it more than petitioner's complaint. The Department of Defense Inspector General's Office had investigated the facts underlying the complaint and issued a Report of Investigation. Korb relied on this report in filing his complaint.[6] All Raytheon officials directly involved in the underlying facts were interviewed under oath as part of the Inspector General's investigation, and at the request of respondents, they provided declarations incorporating the transcripts of those sworn interrogations. In addition, the three respondents and the petitioner submitted affidavits.[7]

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[5] Shortly thereafter, Korb filed an amended complaint, *see* App. 56a, and all references herein are to the amended complaint.

[6] Respondents reserved the right below to challenge the admissibility of this Report of Investigation if the case proceeded to trial.

[7] Two days before the motion was noticed for a hearing, Korb filed a Motion to Lift Discovery Stay. Korb did not request the court to defer a decision on the summary judgment motion pending further discovery, nor did he file an affidavit stating why such deferral was necessary, as required by Federal Rule of Civil Procedure 56(f). *See, e.g., United States v. $5,644,540.00 in United States Currency*, 799 F.2d 1357, 1363 (9th Cir. 1986). Moreover, in exercising its discretion to dismiss the case without further discovery, the trial court's action was consistent with this Court's opinions in *Harlow*, 457 U.S. at 818, and *Anderson*, 483 U.S. at 646 n.6. Thus, Korb's claim now that the district court improperly denied his discovery is without merit.

The district court heard argument on July 15, 1988 and issued a Memorandum Order and Opinion on July 19, 1988, granting respondents' "motion to dismiss and for summary judgment." App. 54a. "Even taking all of [Korb's] allegations as true," the court found, the complaint failed. First, Korb did not and could not claim that respondents exercised any coercive power over Raytheon's decision to remove him, App. 61a-62a, and absent such a claim, government officials could not be held liable under the First Amendment for the conduct of private parties. App. 42a. Second, the district court found that defendants were entitled to qualified immunity, because the complaint failed to allege actions that violated clearly established law. App. 49a. Citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), the trial court concluded that "when defendants' alleged conduct is judged 'in light of pre-existing law,' what is 'apparent' is that the conduct was entirely appropriate and lawful." App. 50a. Third, the court found that respondents' conduct was not the proximate cause of Korb's removal, which was the result of an independent decision by Raytheon. App. 51a-52a.

Relying on this Court's decisions in *Harlow*, 457 U.S. 800, and *Anderson*, 483 U.S. 635, the Fourth Circuit affirmed the district court's grant of the motion to dismiss and the motion for summary judgment on the ground that the respondents were protected by qualified immunity. The panel stated that "at the time the conduct alleged in the complaint occurred, there was no law declaring that such conduct might give rise to a constitutional violation. In fact, the contrary was indicated." App. 23a (citing *Donohoe v. Watt*, 546 F. Supp. 753 (D.D.C. 1982), *aff'd mem.*, 713 F.2d 864 (D.C. Cir. 1983)). Having concluded that respondents were entitled to qualified immunity, the court did not reach any of the other grounds relied upon by the district court to dismiss the complaint.

REASONS WHY THE WRIT SHOULD BE DENIED

This case does not merit review by the Court. The law of qualified immunity is well-settled, and there is no confusion or disagreement among the federal courts as to how the law should be applied. Petitioner's attempt to find uncertainty among the lower courts is therefore unavailing.

Moreover, the issue before the Fourth Circuit was a narrow one, which turned on the facts regarding defendants' conduct and the state of relevant First Amendment law in 1986. Applying the law of qualified immunity to the particular facts of this case, the Fourth Circuit correctly held that respondents violated no clearly established rights when they contacted Raytheon officials about petitioner. Not only was there no clearly established law prohibiting respondents' actions, there was case law holding that conduct remarkably similar to that of the respondents was lawful and appropriate.

Finally, petitioner complains that the Fourth Circuit failed to settle the question of whether private employees may ever assert a First Amendment claim for damages against government officials, and asks this Court to address that issue. The Court should resist petitioner's request for an advisory opinion concerning the general First Amendment rights of private employees. What the law should be on this issue is not determinative of respondents' qualified immunity defense. The only issue here is whether the respondents' particular conduct violated a right that was clearly established in 1986.

A. The Law Of Qualified Immunity Is Well Settled.

This Court defined the qualified immunity defense in 1982: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established rights of which a reasonable person would

have known." *Harlow*, 457 U.S. at 818. In *Anderson v. Creighton*, the Court subsequently explained that the right allegedly violated must be articulated with some particularity, and cautioned against broad generalizations of the relevant legal right that effectively would nullify the qualified immunity defense. 483 U.S. at 639. While the *Anderson* Court stated that the precise fact situation at issue need not have been held unlawful for the qualified immunity defense to fail, it did require that the "contours of the right" that the official is alleged to have violated "be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Id.* at 640 (emphasis added).

B. There Is No Dispute Or Confusion About How To Apply These Standards.

Contrary to petitioner's argument, the Courts of Appeals have not been confused by these standards, nor have they misapplied them. In each of the cases petitioner cites, *see* Petition at 26-27 & nn.7-8, the Court of Appeals correctly applied the *Harlow* standard as refined by *Anderson*, with no disagreement or confusion. These courts first articulated the particular right alleged to have been violated, and then looked to see if the right was clearly established.[8] In accord with this Court's teachings, these courts all stressed that neither a prior case with the exact factual situation nor binding precedent is necessary to find that a right was clearly estab-

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[8] *See, e.g., Dube v. State Univ. of New York*, 900 F.2d 587, 597 (2d Cir. 1990) (issue not whether speaking on issues of public importance may furnish the basis for dismissal from public employment, but whether employee's speech in this instance clearly involved matters of public concern), *petition for cert. filed*, 59 U.S.L.W. 3278 (Sept. 27, 1990); *Cleveland-Perdue v. Brutsche*, 881 F.2d 427, 430-31 (7th Cir. 1989) (issue not whether it was clearly established that deliberate indifference to prisoner's medical needs violated Eighth Amendment, but whether it was clearly established that the failure to remedy systemic deficiencies at prison's health care facility did), *cert. denied*, 111 S. Ct. 368 (1990).

lished. They did, however, abide by *Anderson's* requirement that the right at issue not be defined at too general a level.[9]

C. The Fourth Circuit Decision Is Correct.

The Fourth Circuit correctly applied these clear and well-settled standards regarding qualified immunity, and correctly concluded that the respondents reasonably believed that their conduct was lawful.

First, contrary to petitioner's assertion, the Fourth Circuit articulated the right alleged to have been violated here with appropriate particularity, consistent with this Court's direction in *Anderson.* The issue in this case was not, as petitioner would have it, the generalized question of whether a private individual has a right to be free from official retaliation for criticizing the government. Rather, the particularized issue, as properly articulated by the courts below, was whether in early 1986, reasonable officials in the respondents' position would have understood that it was unlawful to contact a private company and comment adversely on the public statements of one of its employees—statements concerning matters directly related to both the officials' duties and the company's business—where such contacts allegedly result in the employee's dismissal. *See* App. 18a. This formulation comports with the Court's admonition in *Anderson* that the right at issue be framed in terms of an "objective (albeit fact-specific) question." *Id.* at 641; *see* App. 21a.[10]

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[9] *E.g., Alexander v. Perrill*, 916 F.2d 1392, 1397 (9th Cir. 1990); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1504-06 (11th Cir. 1990); *Thompson v. City of Starkville*, 901 F.2d 456, 469-70 (5th Cir. 1990); *Dube*, 900 F.2d at 597-98; *Cleveland-Perdue*, 881 F.2d at 430-31; *Melton v. City of Oklahoma City*, 879 F.2d 706, 729 n.36 (10th Cir. 1989), *rev'd on reh'g on other grounds*, 928 F.2d 920 (10th Cir. 1991) (en banc); *Robinson v. Bibb*, 840 F.2d 349, 350-51 (6th Cir. 1988).

[10] In arguing that the Fourth Circuit over-particularized the right at issue, petitioner stands *Anderson* on its head. In *Ander-*

Next, the Fourth Circuit correctly concluded that the particular right that allegedly was violated in this case—petitioner's right to speak on matters of direct concern to public officials without those officials commenting adversely to petitioner's private employer—was not clearly established in 1986. Even taking all of petitioner's allegations as true, which neither the Fourth Circuit nor this Court is required to do, *see supra* note 1, the Court of Appeals found that no statutes, no regulations, and no case law then existing prohibited respondents' actions. In fact, in a case with allegations almost identical to those alleged here, one court had stated specifically that Cabinet officers and their subordinates "must be able to communicate freely with enterprises having business with [their] department, including the right to offer adverse commentary upon the integrity, competence, judgment, or discretion of [those enterprises'] representatives. Any inhibition of that communication would disserve both the government and those having business with it." *Donohoe*

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son, the Court reversed because the right articulated by the Court of Appeals in that case was simply too general, and its use would "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability by alleging violation of extremely abstract rights." 483 U.S. at 639.

Moreover, contrary to petitioner's contention, the *Anderson* analysis is fully applicable to alleged violations of the First Amendment, even though *Anderson* involved Fourth Amendment rights that turned on issues of reasonableness. *See* Petition at 28 n.9. Although the First Amendment does not use the word "reasonable," it does not provide an absolute right to speak at all times. This Court held over twenty years ago that a public employee's right to comment upon matters of public concern must be balanced with the interest of the government, as an employer, "in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). This balancing, like the Fourth Amendment's requirement of reasonableness, makes it less likely that the contours of a particular right will be clearly established. *See Melton*, 879 F.2d at 729; *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986).

v. Watt, 546 F. Supp. 753, 756 (D.D.C. 1982), *aff'd mem.*, 713 F.2d 864 (D.C. Cir. 1983).

Petitioner is wrong when he asserts that *Donohoe* rested solely on privacy grounds. In that case, Donohoe sent a letter to the Secretary of the Interior, criticizing the Secretary's political views. The Secretary's assistant then wrote to Donohoe's employer, a company with a number of oil and gas leases pending before the Interior Department. He enclosed the letter that Donohoe had sent to the Secretary and expressed the Secretary's surprise at receiving it. Donohoe subsequently was dismissed from his job. 546 F. Supp. at 755. Donohoe alleged that the government officials' actions had caused him to be terminated, thereby violating both his First Amendment rights and the Privacy Act, 5 U.S.C. § 522(b). The court first found that communicating freely with Donohoe's employer was essential to the officials' duties. 546 F. Supp. at 756. It then concluded that "no constitutional provision, statute (other than the Privacy Act) or judicial decision" established the rights that Donohoe alleged the officials had violated. *Id.* The court went on to discuss the Privacy Act because it was the "only arguably applicable provision," *id.*, not because it was the only one raised. The court concluded that Donohoe had failed to allege *any* claim from which the government officials would not be immune. *Id.* at 757.

In addition, *Benson v. Allphin*, 786 F.2d 268 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986), and *Reuber v. United States*, 750 F.2d 1039 (D.C. Cir. 1984), on which petitioner chiefly relies, do not establish, clearly or otherwise, that respondents' actions violated petitioner's First Amendment rights. In *Benson*, the court affirmed the defendants' summary judgment motion in part, holding that they were in fact entitled to qualified immunity for discharging Benson when he disclosed information on matters of public concern to the press. 786 F.2d at 278. Moreover, the only claim from which the government offi-

cials were not immune was the claim that they denied Benson a *government benefit* after his discharge and that this denial was premised on Benson's exercise of his First Amendment rights. *Id.* at 279. *Benson* thus does not establish that government officials may not speak to a person's *private* employer, with the result that the private employer discharges that person. Furthermore, the *Benson* case was not decided until after the relevant events in this case occurred. This Court never has required officials to anticipate the extension of legal principles, especially not when the contours of those principles themselves are not clearly established. *See id.* at 275.

Reuber also is inapposite. As a practical matter, it is difficult to say that a case that produces three opinions on the relevant issue clearly establishes anything. *See Reuber*, 750 F.2d at 1053 (opinion of Wald, J.); *id.* at 1063 (Bork, J., concurring in part); *id.* at 1079 (Starr, J., dissenting in part and concurring in part). Furthermore, the issue in *Reuber* was whether *private* employers, acting in concert with federal officials, could be state actors against whom a *Bivens* action could be brought. *See id.* at 1055; *id.* at 1063; *id.* at 1070. The court unanimously dismissed the claims against the *government* defendants on procedural grounds, *id.* at 1052-53, and never reached the merits of the claims against the private employers, *e.g.*, *id.* at 1057 n.25, 1072 n.9.[11] Given the posture of the *Reuber* case and its multiple opinions,

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[11] On remand, *Reuber* was transferred to the U.S. District Court for Maryland, and that court's decision was appealed to the Fourth Circuit, which held that Reuber's First Amendment rights were not violated because he failed to establish that government actors exerted control over his private employer's decision to reprimand him. *Reuber v. Food Chemical News, Inc.*, 899 F.2d 271, 288 (4th Cir. 1990), *vacated on reh'g on other grounds*, 925 F.2d 703 (4th Cir. 1991) (en banc). In the present case, the district court likewise dismissed Korb's claim on the alternative ground that the respondents did not exercise any coercive power over Raytheon's decision to remove Korb. App. 61a-62a.

Reuber cannot have established that expressions of concern by the respondents to Raytheon executives would violate petitioner's rights.[12]

D. The Court Should Resist Petitioner's Inappropriate Request For An Advisory Opinion.

Finally, petitioner asks this Court to grant a writ of certiorari because if it does not, the alleged First Amendment rights of private employees generally never will be clearly established. Petition at 28-30. The question raised by the Fourth Circuit's decision, however, is not what the law should be, but only whether the right that respondents allegedly violated was clearly established in 1986. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

In *Mitchell*, the defendant was deemed to be entitled to qualified immunity even though the Supreme Court, subsequent to the events that were the basis of the lawsuit, had declared conduct like that of the defendant's to be violative of the Fourth Amendment. The defendant public official was found to be immune nonetheless, because he could not reasonably have predicted that his conduct was unlawful at the time it occurred. 472 U.S. at 530. As in *Mitchell*, the recognition of petitioner's alleged right at some time after the events of this case simply has no relevance to the question of respondents' qualified immunity.

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[12] None of the other, far-ranging Supreme Court cases cited by petitioner as clearly establishing his right even involves a *Bivens* claim. *See* Petition at 19. Moreover, the scatter-shot nature of those cases further demonstrates that petitioner has overgeneralized the right at issue. It is worth noting in this regard that this Court has yet to recognize the existence of a *Bivens* claim under the First Amendment, which further undermines petitioner's claim that his rights were clearly established. *See Schweiker v. Chilicky*, 487 U.S. 412, 422-23 (1988); *Bush v. Lucas*, 462 U.S. 367, 372 & n.7 (1983); *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982).

Article III of the United States Constitution limits this Court's jurisdiction to "cases and controversies." No such "case or controversy" exists in this case with regard to petitioner's broad, theoretical question concerning First Amendment rights. This becomes strikingly apparent when one considers that petitioner can claim no injury to himself if the law continues to be unsettled, *see Warth v. Seldin*, 422 U.S. 490, 501 (1975), and a decision favorably settling the law would not redress petitioner's injury in any way. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). Certiorari to decide the issue is therefore inappropriate.[13]

CONCLUSION

The Fourth Circuit correctly applied well-established law to the particular facts of this case. This case raises no important questions, reflects no circuit conflicts, and does not depart from decisions of this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[13] Petitioner's argument that the alleged right never can be clearly established unless the Court decides the issue is without merit. Rights may be adjudicated in actions for declaratory and injunctive relief, even if it is not necessary to reach them in an action for damages. *See Benson*, 786 F.2d at 279 n.26.